89-2021

Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, JR.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MICHAEL PARSONS, WARDEN, AND
ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

WILLIE GENE GAMBLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

SANDRA D. HOWARD
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ATTORNEYS FOR PETITIONER

June, 1990

QUESTION PRESENTED

Whether a state prisoner's sentence, which has fully expired, may be attacked through a federal habeas action on a conviction for which the prisoner is "in custody," when the current conviction has been enhanced by the prior, fully expired sentence.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Michael Parsons, Warden of the correction facility housing habeas corpus petitioner Gamble, and the Attorney General of Oklahoma, by and through counsel, submits this petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. In behalf of Petitioner, counsel has submitted the filing fee and an entry of appearance. This petition has been arranged in the order specified by Rule 21.1 of this Court.

The Attorney General of Oklahoma, Robert H. Henry, on behalf of himself and the Warden of the state correctional facility currently housing federal habeas petitioner Willie Gene Gamble, petitions for a Writ of Certiorari to review the judgment of the

United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals (Appendix A, submitted herewith) is not yet published as a request to stay the issuance of the mandate was made and granted by the United States Court of Appeals for the Tenth Circuit, pending notification by the Clerk of this Court that a Petition for Writ of Certiorari had been filed. The opinion of the United States District Court for the Western District of Oklahoma (Appendix B, submitted herewith) is not reported.

JURISDICTION

The decision of the Tenth Circuit Court of Appeals (Appendix A, submitted herewith) was entered on March 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PARTIES

All parties are listed in the style of the case.

FEDERAL STATUTE INVOLVED

Title 28 U.S.C. § 2254(a) provides as follows:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT

Respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the convictions in four separate cases from the District Court of Comanche County, State of Oklahoma, which convictions have been fully served. According to his petition for writ of habeas corpus, the Respondent is currently serving an unrelated sentence.

Petitioner filed a Motion to Dismiss for lack of jurisdiction in response to the petition in the United States District Court for the Western District of Oklahoma on the basis that the Respondent was not "in custody" for purposes of 28 U.S.C. § 2254(a). The United States District Court entered an Order of Dismissal on August 31, 1989 (Appendix B, submitted herewith).

The Respondent appealed the dismissal to the United States Court of Appeals for the Tenth Circuit. A three judge panel, speaking through Judge Ebel, reversed the district court's dismissal, acknowledging that the Respondent did not explicitly list his present sentence as the one under attack (Appendix A, submitted herewith). Judge Ebel relied on the Respondent's citation to Maleng v. Cook, 490 U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam) in the "Traverse to Motion to Dismiss" as clear indication that his current sentence had been enhanced by the four fully served sentences which he sought to challenge.

The Petitioner asked the United States Court of Appeals for the Tenth Circuit to stay the issuance of the mandate in the case in order to allow Petitioner an opportunity to pursue this Petition for Writ of

Certiorari. The Tenth Circuit granted that motion, staying the issuance of the mandate pending notification by the Clerk of this Court on or before May 16, 1990 that the Petition for Writ of Certiorari had been filed.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of the "in custody" requirement of the federal habeas corpus statute to convictions which have been fully served. Further, it is important because the Tenth Circuit read into the petition, with no claim from Respondent in the initial petition, that what he meant to do was attack his current conviction. Finally, this Court's decision in Maleng v. Cook, supra needs to be reconciled due to inconsistent interpretations by lower courts

of that opinion. To allow the opinion of the Tenth Circuit Court of Appeals to stand will spawn multiple attacks in multiple jurisdictions over a single current conviction, which will result in an increased burden on an already overburdened court system.

WHERE A SENTENCE HAS BEEN FULLY SERVED, A FEDERAL HABEAS PETITIONER SHOULD NOT BE CONSIDERED "IN CUSTODY" FOR PURPOSES OF A PETITION FOR WRIT OF HABEAS CORPUS WHERE THE CONVICTION IS LATER USED TO ENHANCE THE PETITIONER'S CURRENT CONVICTION.

In Maleng v. Cook, 490 U.S.___, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), this Court addressed the applicability of the "in custody" requirement of Section 2254 to convictions which have previously been served yet are used for enhancement purposes

on a later conviction. At the close of that opinion, this Court said,

> We express no view on the extent to which the [previously served] conviction itself may be subject to challenge in the attack upon the [current] sentences which it was used to enhance.

Id. at 104 L.E.2d 547.

Yet in spite of that specific language, the Tenth Circuit Court of Appeals and two other circuit courts have, citing the decision in Maleng as authority, found a petitioner to be "in custody" on an already served sentence where that sentence was used to enhance the sentence in the current conviction.

In the decision below, the Tenth Circuit Court of Appeals cited two circuit court cases as support for their position. In Clark v. Com. of Pa., 892 F.2d 1142 (3d Cir. 1989), the Third Circuit Court of Appeals

found the reviewability of already served convictions was allowable due to their collateral enhancement consequences on a 1980 sentence. The court did this in reliance on this Court's opinion in Maleng, id. at 1145, in spite of an earlier citation to the specific language in Maleng just quoted by this Petitioner herein.

And in Taylor v. Armontrout, 877 F.2d 726 (8th Cir. 1989), that court also relied on Maleng and said,

> The Supreme Court recently decided this issue. The Court in Maleng v. Cook, ___ U.S. _ , 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), held that once the sentence imposed for a conviction has completely expired, an individual is not "in custody" under that conviction for purposes of habeas corpus attack (and therefore a federal court lacks jurisdiction), even though the conviction has been used to enhance the length of a current or future sentence imposed for a subsequent conviction. Maleng thus confirms that the District

> Court was without jurisdiction to entertain [petitioner's] attack on his 1982 conviction.

Id.

However, that court then suggested to the petitioner that he could challenge his current sentence, asserting as a ground for that challenge the invalidity of the previously served conviction which was used to enhance.

Both of these courts and the Tenth Circuit cite Maleng v. Cook, supra, as support for their decisions, even though this Court expressly said no opinion was expressed in Maleng on this issue. Maleng v. Cook, 104 L.Ed.2d at 597.

In Hendrix v. Lynaugh, 888 F.2d 336 (5th Cir. 1989), the Fifth Circuit Court of Appeals followed Maleng and held the petitioner was not "in custody" under Section 2254 where the 1972 conviction under

attack was fully served and not used to enhance the current conviction the petitioner was serving. That petitioner also argued that his 1972 conviction adversely impacted on his prison classification, housing, privileges and earned credits, in essence enhancing his current sentence. Again, the Fifth Circuit Court of Appeals cited specific language in Maleng and held,

> ...a conclusion that [petitioner] is not "in custody" follows a foritori from Maleng. Enhancement is a collateral consequence insufficient to render the petitioner "in custody" under the previous conviction.

Id. at 338.

Thus, the Fifth Circuit differs from the Tenth, Third and Eighth Circuits in the interpretation to be given to Maleng. The Petitioner contends that the post-Maleng

holdings of the latter three courts are erroneous and inconsistent with this Court's holding in Maleng. To allow a habeas petitioner to do indirectly what he is not allowed to do directly, challenge a sentence already served, defeats the "in custody" requirement of the federal habeas statute.

Further, to allow the opinion of the Tenth Circuit to stand will disrupt the administration of criminal justice. The federal courts have long held that needless, piecemeal litigation need not be tolerated. Imagine trying to sort through the allegations of a pro se litigant who seeks to challenge his current conviction as well as the four, separate, previously served convictions which were used to enhance the current sentence. In addition to the sometimes incoherent allegations, the state court records for each sentence would have

to be retrieved and reviewed. The twenty (20) days normally allowed to the State to respond to the petition will have to be doubled or tripled, further delaying and clogging federal court dockets. Add to this the continuing bewilderment of the public who cannot understand why these convictions, which could have and should have been challenged when they were being served, are being reviewed for correctness years after they have been imposed, served, and supposedly "put to rest". Plus, allowing such tardy challenges without consideration of potential procedural bars (which will necessitate further records investigations) which may exist in those previously served convictions, improperly broadens the decision in Maleng.

In Maleng this Court addressed the subject matter jurisdiction question of the

"in custody" requirement. Consistently throughout that opinion, this Court stated that collateral consequences are insufficient to satisfy the "in custody" requirement of Section 2254. The court below took Maleng v. Cook, supra, and turned it into an opinion compelling the conclusion that the "in custody" requirement is met by the simple allegation that current custody is improper because of the enhancing effect of a fully served conviction. The Petitioner contends that this conclusion is erroneous. The Petitioner further contends that the decision of the Tenth Circuit Court of Appeals is not in accordance with this Court's decision in Maleng v. Cook, supra. Petitioner asks this Court to grant a Writ of Certiorari to resolve this inconsistency in favor of the position advocated by the Petitioner.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

Sandra D. Howard

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112 State Capitol Building
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ATTORNEYS FOR PETITIONERS WARDEN PARSONS AND THE ATTORNEY GENERAL OF OKLAHOMA

CERTIFICATE OF MAILING

On this 22nd day of June, 1990, a true and correct copy of the foregoing was mailed to:

Willie Gene Gamble
#90943
James Crabtree Correctional Center
Rt. 1, Box 8
Helena, OK 73741

Sandra D. Howard
SANDRA D. HOWARD

SDH:EJB/vid/gamble.pet

"APPENDIX A"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIE GENE GAMBLE,

Petitioner-Appellant,

v.

MICHAEL PARSONS, WARDEN, and ATTORNEY GENERAL, State of Oklahoma,

Respondents-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 89-1232-W)

Willie Gene Gamble, petitioner-appellant, pro se.

Robert H. Henry, Atty. Gen., Elizabeth J. Bradford, Asst. Atty Gen., Oklahoma City, Oklahoma, for respondent-appellees.

Before MCKAY, SEYMOUR, and Ebel, Circuit Judges.

EBEL, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

Appellant is an Oklahoma state prisoner who appears pro se seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging that his present sentence was improperly enhanced by earlier convictions that were obtained against him as a result of involuntary and uniformed pleas of guilty. The sentences on all of the earlier

convictions have been fully discharged. The matter is presently before the court on appellant's application for a certificate of probable cause pursuant to 28 U.S.C. § 2253. After carefully reviewing the record, we conclude that appellant has made a "substantial showing of the denial of a federal right" necessary for the issuance of a certificate of probable cause. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

The district court dismissed appellant's petition on the basis of Maleng v. Cook, _____ U.S. _____, 109 S.Ct. 1923 (1989) (per curiam), in which the Supreme Court held that when a sentence is fully expired, the collateral consequences of the conviction upon which the expired sentence was based are not sufficient to render a petitioner "in custody" for purposes of a

habeas petition attacking that conviction, even though such prior conviction may be used to enhance punishment for a later conviction under which the petitioner is presently incarcerated.

However, this court has observed that Maleng "left open the question of to what extent a petitioner may challenge an expired conviction in an attack on a conviction for which the petitioner is in custody, when the latter conviction has been enhanced by the prior one." Waldon v. Cowley, 880 F.2d 291, 292 n.1 (10th Cir. 1989). It is that question that we now address.

In Maleng, the "[r]espondent's petition listed the [expired] 1958 conviction as the conviction under attack, alleging that it was invalid." Maleng, _____ U.S. at _____, 109 S.Ct. at 1924. The Court concluded that Cook was not "in custody" under the expired

1958 conviction and thus he could not directly attack that conviction in a habeas petition. However, the Court went on to affirm the circuit court's ruling that the respondent was "in custody" under a 1978 state conviction which he had not yet begun to serve. Id. at 1926. The Court construed the respondent's pro se habeas petition deferentially and concluded that "it can be read as asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction." Id. at 1926-27. As construed, the Court affirmed the court of appeals' decision which had ordered that the matter be remanded to the district court for a hearing on the merits of the habeas claim.

Although the Court in Maleng said "[w]e express no view on the extent to which the [fully discharged] conviction itself may be

subject to challenge in the attach upon the [later] sentences which it was used to enhance," id. at 1927, the effect of the decision suggested the appropriateness of such an attack. The Court allowed the defendant to continue with his habeas action after construing it to be directed at his existing sentence, even though the ultimate question raised was the constitutionality of the prior conviction that was used to enhance the existing sentence.

As we read Maleng, it precludes a defendant from challenging a fully-expired conviction in isolation even though it may have potential collateral consequences in some future case. Further, even if the fully-expired conviction has, in fact, been used to enhance a subsequent sentence, it may not be attached directly in a habeas action. Rather, the attack must be directed

toward the enhanced sentence under which the defendant is in custody. However, if the attack is so directed, the defendant may argue that his present sentence is improper because it has been enhanced by a prior, unconstitutional conviction.

This is the same reading of Maleng that has been given by the Third and Eighth Circuits, which are the only two other circuits to have considered the issue. See Taylor v. Armontrout, 877 F.2d 726, 727 (8th Cir. 1989); Clark v. Pennsylvania, 892 F.2d 1142, (3d Cir. 1989). In Clark, the Third Circuit said

> [i]n light of the Supreme Court's decision in Maleng v. Cook, . . . [petitioner] now concedes that he is no longer in custody as a result of the [fully-served] convictions and, accordingly, admits that the district court does not have jurisdiction to consider the merits of those petitions. The reviewability of those convictions nonetheless remains

> before us, as discussed infra, because of their collateral enhancement consequences on the 1980 sentence [for which petitioner is "in custody"].

Id. at 1145.

Although appellant did not in his petition explicitly list his present sentence as the one under attack, in his "Traverse to Motion to Dismiss" he cited to Maleng and made clear that his current sentence had been enhanced by the expired conviction that he sought to challenge. R. Doc. 10 at 2. We believe appellant's habeas petition, when construed with the deference to which he is entitled as a pro se litigant, should be read as asserting a challenge to his present sentence to the extent that it has been enhanced by the allegedly invalid prior conviction. See Maleng, ____ U.S. _____, 109 S.Ct. at 1927.

As such, he satisfies the "in custody" requirement of 28 U.S.C. § 2254.

Therefore, we RESERVE the district court's dismissal of appellant's petition for habeas corpus and REMAND for further proceedings consistent with this opinion.

"APPENDIX B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WILLIE GENE GAMBLE,	)
	)
Petitioner,	)
	)
v.	)
	)
MICHAEL PARSONS,	)
	)
Respondent.	)

ORDER OF DISMISSAL

Petitioner, pro se and in forma pauperis, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he attacks four convictions of February 24, 1969. Respondent has filed a motion to dismiss, with brief in support, to which petitioner has replied.

The sentence imposed on petitioner's 1969 convictions have been fully discharged, and

petitioner is presently serving a sentence imposed for some other conviction. In order to obtain relief under 28 U.S.C. § 2254, petitioner must be in custody pursuant to the state court judgment being challenged. 28 U.S.C. § 2241(c)(3); see also 28 U.S.C. § 2254(a); Carafas v. LaVallee, 391 U.S. 234 (1968). In Maleng v. Cook, ____ U.S. ____, 109 S.Ct. 1923 (1989) (per curiam), the Supreme Court held that when a sentence has fully expired, the collateral consequences of that conviction are not sufficient to render a petitioner "in custody" for purposes of a habeas petition, even when such prior conviction is used to enhance punishment for a later conviction, under which a petitioner is presently incarcerated. It is only under the later conviction that a petitioner can be considered to be "in custody." Id. at 1926.

Thus, this petition, attacking only judgments for which the sentences have completely expired, must be dismissed.

As petitioner is not "in custody" under the convictions the he attacks, the Court lacks jurisdiction to entertain this petition for writ of habeas corpus, and it is hereby dismissed.

IT IS SO ORDERED this _____ day of August, 1989.

LEE R. WEST
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET
ON 8-31-89